
IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. W. ROBINSON, as Assignee of
a Certain Judgment,

Appellant,

vs.

W. F. HAYS and W. M. RUSSELL,

Appellees.

No. 1861

In the Matter of the Establishment of a Certain Lien
Claim of W. F. Hays, etc.

Appeal from the United States Circuit Court of the
District of Washington, Western Division

APPELLANT'S OPENING BRIEF

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STATEMENT.

1. "John Sullivan died September 26, 1900, at Seattle, King County, Washington," seized of property in that state which Marie Carrau claimed under a nuncupative will which was probated in the Superior Court of King County.

Hannah O'Callahan et al., claiming to be the only living heirs of the deceased, opposed the claim under

the nuncupative will and litigation ensued in both the state and federal courts, continuing for many years and until the state courts decreed that Marie Carrau had no right under the will.

2. O'Callahan et al. instituted suit in the Circuit Court of the United States for the Western District of Washington against Administrator O'Brien and Marie Carrau, by which they sought to annul such will and the probate thereof. The Circuit Court entered a decree in favor of O'Callahan et al., from which Marie Carrau appealed to the United States Circuit Court of Appeals for the Ninth Circuit and this court reversed the Circuit Court and directed the action to be dismissed and for costs in favor of Marie Carrau. O'Callahan et al. caused the decision of this court to be reviewed by the Supreme Court of the United States and the decision of the United States Circuit Court of Appeals was affirmed (See *O'Callahan et al. vs. O'Brien et al.*, 60 C. C. A. 347; 125 Fed. 651; same case, 199 U. S. 89).

3. Upon filing the mandate of the Supreme Court of the United States the Circuit Court of the United States for the District of Washington on August 7, 1905, entered judgment of dismissal and for costs in favor of Marie Carrau and against complainants in the sum of \$2619.90.

4. On March 16, 1908, Marie Carrau assigned

said judgment to J. W. Robinson to be collected by him and disbursed pro rata to all those who had advanced money to her to carry on the litigation in the federal court (Trs. 4), which assignment was filed in the Circuit Court March 26, 1908.

O'Callahan et al. appealed to the Supreme Court of the United States from the judgment of dismissal and for costs entered August 7, 1905, which was affirmed (See 208 U. S. 613).

6. The complainants in the Circuit Court had given security for costs in favor of the respondents in the sum of \$400 with the United States Fidelity & Guaranty Company as surety.

7. The sureties on the cost bond refusing to pay, Marie Carrau entered suit in the state court against the company and secured judgment for the sum of \$400 with interest and costs, which was appealed to the Supreme Court of the state and affirmed and thereafter this amount was collected and paid by Marie Carrau to W. M. Russell, one of these appellees (Trs. 106) and the same credited on the judgment for costs herein mentioned.

8. After the assignment to Robinson, W. F. Hays secured an execution upon this judgment for costs and instituted garnishee proceedings against a large number of tenants of the Sullivan Block in the

city of Seattle, which proceedings were quashed by the Circuit Court.

9. W. F. Hays claiming a lien against the judgment assigned to Robinson and taking no action to establish his rights under such alleged lien, Robinson applied to the Circuit Court and was granted a show cause order against Hays requiring him to establish his claim of lien and proceedings were had with reference thereto, beginning on page 45 of the Transcript, and that this Honorable Court may understand the situation we quote from this, page 46:

“COURT.—The court has issued an order to show cause in order to settle the question as to who was entitled to take the necessary steps to get this fund. Mr. Hays has initiated proceedings to collect it, and on examination of the record I find that he is not entitled to proceed in that manner on his own initiative. Now, if there is anything further to be done, it ought to be ascertained who should push the matter.”

In reply to the court Mr. Hays said in substance, that the judgment had remained inactive for more than two years; that no steps had been taken to enforce it, that,

“So far as the distribution of the money is concerned I have an interest in this judgment to the extent of moneys that I myself have advanced in the case to which I would be entitled to a final order of this court, and the others who have advanced funds for the plaintiff in the original suit. * * * I filed a lien as a counsel in

the case, as attorney in the case, upon the judgment, for the purpose of preserving the fund to the time that the money might be subject to distribution and then if that lien is improper or illegal it will be the duty of the court to determine. * * * I could get on the witness stand this morning and tell your honor just what money I have paid out. I know I have paid out hundreds and perhaps a thousand dollars I would not charge against this judgment. I do not see how, even if your honor has all the evidence in on the side of the plaintiff, as assignee, or on the side of myself, who seeks to enforce the lien for moneys advanced—I do not see how your honor could now determine how much the interest would be in the judgment. * * * I have no controversy with counsel or controversy with this plaintiff, Miss Carrau, as to how this money shall be distributed. * * * I am willing to have your honor dictate who shall enforce the collection of this judgment. I would be glad to be relieved of that burden. I do not want it and I don't see any necessity for trouble between counsel or warfare as to how the money shall be distributed if it ever shall be obtained.”

The Circuit Court then announced:

“You may go on, I will hear it. (To Mr. Hays.) You may proceed in your own way to show me that you are entitled to proceed. You are here now to show me you are entitled to the lien.”

Thereupon Mr. Hays proceeded to introduce evidence in support of his lien, which is found, beginning on page 52 of the Transcript, being the bill of exceptions, and which includes in addition to the oral testimony the exhibits introduced by Mr. Hays in

support of his lien and the testimony and exhibits introduced in opposition thereto.

The matter was thus submitted to the Circuit Court and thereafter a memorandum decision was filed July 6, 1909 (See Trs. 6) in which the court found that Russell, one of these appellees, had made a loan of \$425, repayment being guaranteed by Hays, and that altogether Russell had advanced for expenses of litigation to Miss Carrau fifteen hundred dollars, and his honor in such decision said:

“To reach an equitable adjustment the court directs that Robinson shall have the right to control proceedings for collecting the judgment, as under the statute if any execution is necessary it must be issued in his name. The money when collected shall be applied to repayment of the amount actually loaned by Russell with accrued interest as provided in the two written contracts signed by Marie Carrau dated respectively April 7, 1902 (See Ex. 3, page 157) and April 19, 1902 (But we are unable to find any contract of this date introduced in evidence) and the surplus if any to be divided equally between Hays and Robinson.”

9. After waiting until December, 1909, for Mr. Hays to present a judgment in accordance with such memorandum decision establishing his lien and failing to do so, Robinson gave notice requiring that the record be perfected so that a final judgment might be entered from which an appeal might be taken, and also moved for a reconsideration of the conclusion of

the court as to the establishment of such lien, and Robinson in the meantime having collected the judgment and caused the funds to be paid into the registry of the court, made application to the court on December 15, 1909, to have the funds distributed pro rata to the various persons who had advanced funds to carry on the litigation, in addition to those claimed by Hays and Russell (Tras. 8 to 16 inc.)

On January 25, 1910, the application for a reconsideration of the decision made on July 6, 1909, establishing the Russell-Hays lien was denied by the Circuit Court and the petition for distribution of the moneys pro rata was denied, and on February 23, 1910, R. J. Ferguson et al., who had also advanced funds to Miss Carrau to carry on the litigation, filed their verified petition in that cause in which the funds had been collected and were in the registry of the court, asking to be allowed to intervene and claiming their share of such judgment for costs, and asking that an order of distribution be made accordingly (Trs. 26) and this petition was denied and the petition stricken (Trs. 38-40).

On January 25, 1910, the court entered a final order with reference to the memorandum decision of July 6, 1908, and directed the clerk to pay to Russell \$1790 and to Hays \$496.33, which was done, and the next day Robinson applied to the court for a show

cause order requiring said funds to be returned into the registry of the court, or show cause why they should not be, and also applied to the court in the usual manner, by petition, assignment of error, etc., for an order allowing an appeal and fixing a supersedeas bond, and on February 28, 1910, the Circuit Court fixed the supersedeas bond at one thousand dollars and ordered that the said Hays and the said Russell repay into the registry of the court the money so withdrawn, upon the filing and approval of such bond (Trs. 41) Petition, Order allowing Appeal, Approval of Bond (Trs. 121-9).

From these orders and judgments the appellant as such stakeholder has appealed to this court.

ASSIGNMENT OF ERROR.

1. The Circuit Court erred in not holding that neither Hays nor Russell had any lien.
2. That if Hays ever had a lien he lost his rights by laches.
3. The court erred in allowing Russell \$1790.00 or any other sum, and erred in holding that Russell was before the court for any purpose whatever.
4. The court erred in allowing Hays \$496.33 and in not holding that he had not taken the necessary

steps to perfect a lien if he had one, and that his testimony was wholly insufficient to establish an amount necessary to foreclose or establish the lien.

5. The court erred in holding that there was anything whatever due the said Hays by way of money advanced, because the burden was upon him to establish that fact by a fair preponderance of the evidence.

6. The court erred in holding that the evidence was sufficient to establish any amount due Hays or Russell, or sufficient to establish or foreclose the lien.

7. The court erred in refusing to reconsider its action as contained in its memorandum decision of July 6, 1909, and in not granting a rehearing.

8. The court erred in not granting the application for a distribution of this fund pro rata among those who filed their petition and motion and came into court to have that question determined, and in striking the same.

9. The court erred in holding that it had any jurisdiction whatever to determine any question of fact or law between Russell and the other interested parties, including the assignee of the judgment and Marie Carrau.

We contend that Mr. Hays had no lien of any kind or character against this judgment or fund.

There was only one question before the Circuit Court at the hearing and that was the validity of the lien claimed by Mr. Hays, with the additional question of fact to determine in the event the court held that Hays had a lien, the amount, and we submit that the court went entirely outside the record when it determined any question of law or fact as between the assignee of the judgment and Mr. Russell. Mr. Russell was not before the court in any capacity except as a witness to sustain the Hays lien claim. This was an application on the part of the assignee of the judgment to compel Hays to take some action to establish his claim and the court saw fit to proceed in a summary manner to hear the question as to whether or not Hays had a lien, and this is evident from the remarks of the Circuit Court: "You are here now to show me you are entitled to the lien." (Trans. 51). The right of any other person to share in the proceeds of this judgment was not before the court and could not have been before the court in this character of a summary proceeding. Russell could not have been heard in this proceeding with reference to the Hays lien to establish any rights of lien he might have had against this judgment. If he claimed an equitable division of the proceeds realized upon this judgment by reason of moneys advanced he could have been heard only upon some character of an application or petition and with notice to all others who

were similarly situated with him and who had advanced to Miss Carrau funds to carry on this litigation and hence the order of the court allowing Russell fifteen hundred dollars was made without jurisdiction and is void. (See 4 Cyc. 1005).

The Circuit Court in its memorandum decision of July 6, 1909, seemed to proceed upon the theory that the court had jurisdiction to reach an equitable adjustment, and the appellant, the assignee of the judgment and the stakeholder of the funds, could have no reasonable objection to the exercise of such power on behalf of the Circuit Court if the court had taken into consideration the rights of all those who had advanced funds to Miss Carrau to carry on this litigation, and the Circuit Court was made acquainted with the fact that there were a large number of other people who had contributed just as Mr. Russell had contributed. The witnesses testified as to a large number of other persons having contributed funds, which was conceded by Mr. Hays, and the evidence was placed before the Circuit Court to the effect that the assignment of the judgment to Robinson was for the purpose of distributing the proceeds of the judgment when collected, to the various parties who had made these contributions, including Mr. Hays, if he were able to show that he had advanced funds by reason of which he would have been entitled to a lien or to an equitable share in such proceeds.

After the fund had been collected and paid into the registry of the court, all other persons, who had not been before the court and who had advanced money, filed a verified petition and asked to be allowed to intervene and be heard with reference to the distribution of the fund. This was denied them and we were still unable to understand how the Circuit Court considered Mr. Russell before the court without any application and without any solicitor to represent him, and called only as a witness, and when the only question for hearing was whether or not Hays had a lien against this judgment. If our position be correct with reference to the jurisdictional question, then the order made by the court as to Russell was utterly void. The court in its decision announced that Hays would not be entitled to absorb the entire fund to the exclusion of his associate and Russell. The court also found that Miss Carrau agreed that Hays should be reimbursed from any fruits of the litigation, but we are unable to find from any of the contracts entered into between Mr. Hays and Miss Carrau such provision. We think an examination of Exhibits 1, 2 and 3 will convince this court that, based upon these contracts, neither Mr. Hays nor Mr. Russell had any right of lien, and in fact it has never been claimed that Mr. Russell had a lien, but it was claimed in the testimony that Russell had assigned his claim, whatever it was, for col-

lection to Mr. Hays, and the only evidence with reference to the assignment is on page 55 of the Bill of Exceptions, in which Mr. Russell testified that after the Supreme Court of the state had dismissed the will contest and awarded the property to the Irish heirs he spoke to Miss Carrau about the judgment. He says, "I assigned the claim to Mr. Hays for collection about three or four months ago, as near as I remember." The date when he was testifying was October 30, 1908, but Mr. Russell's testimony fails to establish this amount which he advanced or to show that it was advanced or used in this litigation in the Federal Court. We think the record at pages 55 to 60 shows that the money was used in the State Court and not in the Federal Court.

We ask the court's attention to the contracts, being Exhibits 1, 2 and 3, based upon which, as we understand Mr. Hays' position, he claims he is entitled to a lien for moneys advanced and that Russell also had a lien. The first exhibit (page 155), after making other provisions, says: "It is understood that whatever costs, fees or charges of the courts in such action or proceedings that may be required or advanced shall be paid by the said Marie Carrau out of said estate," and we insist that this cannot furnish the basis for a lien against a judgment for costs, even if Mr. Hays had shown sufficient evidence as to the amounts or the purposes for which used.

Exhibit No. 2 (page 156) says: "It is understood that whatever costs, fees or charges of the court in such action or proceeding that may be required to be advanced shall be deducted from the sums so recovered and the sum payable to the said Hays shall be reckoned upon said basis." So your Honors will see again that whatever moneys were advanced were to be repaid out of the estate and hence were wholly contingent and depended upon Miss Carrau establishing her rights to the estate.

Exhibit 3 (page 157) is an agreement between Carrau and Russell which Hays signed as guarantor, in which Russell loans Miss Carrau \$425.00, and for the use of this money she was to pay \$1,000. "And in case she shall fail and not recover any sum of said estate she agrees hereby to pay back said principal sum of \$425.00 with lawful interest thereon from date until paid," which again clearly shows the minds of those individuals and no lien was contemplated, but the evidence shows that Miss Carrau, after she collected the judgment of \$400, etc., under the cost bond, paid the proceeds to W. M. Russell, which repaid Russell for said \$425.

Mr. Hays was wholly unable to state the amounts he claimed he had advanced or to whom he paid them or for what purpose used. On pages 82-83 Hays testified that the money secured from Mr. Russell was to

be paid back out of the estate in the event of success, and that that same condition prevailed with reference to all money that was received. On page 84 Mr. Hays admits that while he guaranteed the payment of the \$425.00 he has never paid it.

The testimony of Mr. Russell as to advances made is to be found in his answer to the question as to the total sum that he had advanced:

“A. About sixteen hundred dollars; ten hundred and fifty, the exact amount I don't know, was advanced at the first proceeding.”

We submit that this is wholly insufficient to establish any amount advanced or the basis for any lien or claim whatever so far as this fund is concerned, and the strength of Hays' testimony as to the amount advanced is to be found in his cross-examination by Mr. Godfrey (pages 64 to 93), in which he admits that he never kept any books or accounts or vouchers or receipts for disbursements made in the Federal Court. He speaks of certain funds having been advanced for the joint litigation, from which we presume he meant the litigation pending in the different jurisdictions, and we submit that any moneys advanced for expenses in the State Courts, though such litigation related to the same subject matter, could not be made a lien or an equitable claim against this judgment for costs, and it is impossible to determine with any degree of certainty from the

whole of his testimony the amount of money which he even claims to have advanced, based upon which he asserts a lien against this judgment.

Your Honors understand that at the time Hays established his lien the judgment had not been collected, but after the Circuit Court held that the assignees of the judgment could enforce it, he proceeded to collect, and after crediting the amount of money collected under the cost bond and which was paid over to Russell by Miss Carrau, the execution netted \$2,796.58, and all these facts were set forth in the petition of Ferguson (Trs. 26), showing the various parties and the amounts contributed along with Russell toward the expense of the litigation.

The testimony of Mr. Hays and that of Mr. Russell is wholly insufficient to enable the court to find any special amount that was advanced in this litigation by either of these individuals, or to determine therefrom the amount which Hays claimed as a lien.

As against the evidence of Hays and Russell, Marie Carrau testified (beginning on page 93) in substance, that she went to her friends and secured every dollar to meet the expenses of that litigation. She testified that when she signed the contract with Hays he told her that it provided that he, Hays, should advance all the money necessary to carry on this litigation, but that afterwards she found the con-

tract did not contain these provisions and Mr. Hays refused to furnish any money, and after that she testifies that she secured all the money and paid all the bills with reference to the litigation; that such of the bills as Hays claimed that he paid were paid with money she secured and turned over to him.

Beginning on page 99 is the following testimony :

“Q. Now, Miss Carrau, who paid for these briefs and expenses of the court from time to time as they were incurred and as they were paid?

A. I did.

Q. You paid for all of them?

A. For all of them.

Q. How about the briefs in the Supreme Court of the United States?

A. I paid for them, too.”

Miss Carrau testified that she gave Mr. Hays the money which he cabled to Ireland, and on pages 103-4 she shows how she turned over to Mr. Hays one hundred fifty dollars in cash which was never used in the litigation and never repaid to her, and none of this testimony was denied by Hays.

Much of the evidence introduced on the part of Mr. Hays was wholly immaterial and related to proceedings in other courts and to business relations with reference to his employment of the late Senator Mitchell of Oregon, and such testimony was admitted over our objections, but constitutes no ground what-

ever for establishing the lien or the amounts advanced, and therefore is wholly immaterial.

These contracts make no provision as to who is to advance the money necessary to meet the costs on behalf of Miss Carrau, and if Hays or Russell did advance any money as costs in the United States Circuit Court, it created the relation of debtor and creditor only and did not provide for a lien against the judgment for costs. As a matter of law, the right of lien for moneys advanced to carry on litigation can exist only by contract, expressed or implied.

We think it must be conceded that even in this summary proceeding, if permissible at all, the same general rules apply with reference to testimony necessary to establish a lien and to foreclose it. We seriously doubt whether the court had jurisdiction to proceed at all in the manner it did. Certainly the validity of a lien, the legality and justice of the claim upon which it is based, are questions to be decided in the action to foreclose or establish the lien, and such action may or may not be brought before the court who renders the judgment upon which the lien is claimed, and our only object in applying to the court for a show cause order against Mr. Hays with reference to some claim of lien he was making was to put in motion the machinery of the court and compel Hays to action. We think Sec. 138 R. & B. Code ap-

plies only when there is some dispute between the solicitor and his client, by reason of which the solicitor claims the right to money or papers in his possession which he received from or for his client. Under this statute an attorney has a lien for compensation, but we think it is limited to that subject; so that if this proceeding is to be maintained at all, it must be upon the theory that Russell and Hays have an equitable lien against the funds, and we believe should have been heard only upon an application for distribution, in which all parties in interest were before the court.

Washington has an attorney's lien, found in Sec. 136, Vol. 1, R. & B. Code, being Sec. 4772, B. C., but we submit that this statute applies only to *compensation*, and does not include advances made by the solicitor for the client and cannot furnish the basis for a claim either in law or equity against the judgment, unless by agreement between the parties. Sec. 137 relates to proceedings to compel the delivery of papers, and Sec. 138 relates to proceedings where a lien exists. There is no claim made here as to compensation. Mr. Hays sought to establish a lien against this judgment solely upon the ground that he had advanced cost money from time to time to assist in the litigation, and in this we think the testimony is wholly insufficient, even if he had the right of lien.

We submit that none of these parties who advanced the money to Miss Carrau have a claim by way of lien or any right to insist upon this judgment for costs being distributed to them, but Miss Carrau, with her high sense of honor and justice, assigned this judgment to Robinson for the purpose of having it collected and distributed pro rata to all those, including Russell, who had advanced her funds, and she had a right to concede this to these friends, and based thereon upon the record and all the testimony and upon the petition filed for that purpose, it was the duty of the court to determine that neither Hays nor Russell had any lien against this judgment, but in harmony with the wishes of Miss Carrau the Circuit Court should have entered an order distributing the fund to those parties, but instead, he entered an order or judgment granting to Russell a lien and distributing to him \$1,790, and to Hays \$496.33, which we submit was without authority of law, and that the orders and judgments with reference to this lien fund should be reversed and the Circuit Court directed to distribute the fund in accordance with the wishes of Marie Carrau.

JAMES J. GODFREY,
J. W. ROBINSON,
Solicitors for Appellant.

ON MOTION TO DISMISS APPEAL.

The appellees have filed a motion to dismiss this appeal upon two grounds:

A. Because the appellant waived his right of appeal.

B. Because the relief granted by the Circuit Court was upon his application.

We submit that the record does not support either theory. In the first place appellant merely applied to the court to require Hays to proceed in such manner as he might elect to establish his claim of lien, and, as we contend, that was the only question before the court. Hays had been claiming a lien against the judgment and claiming the right to control the enforcement of the judgment, and after waiting for many months the appellant applied to the court to require Hays to act, and the court issued an order requiring him to show cause on a certain date why he did not proceed, and on that date the court proceeded in a summary manner to pass on the question of the lien, and in doing so also directed what was in effect a distribution of the fund when the judgment should be collected. This decision was filed on July 6, 1909, which authorized Robinson to

collect the judgment, which he did, and on October 15, 1909, execution was issued, a levy made, and then the judgment was paid and Robinson caused the same to be placed in the registry of the court, as he supposed, to await a regular order of distribution, and the appellant then filed in the court a petition in intervention on behalf of all those who had contributed cash to meet the expenses of this litigation waged by Miss Carrau against the Irish heirs, and also applied to the court for a reconsideration of his decision of July 6, 1909, in so far as it attempted to determine to whom the fund should be distributed when collected (see Trans. 25 to 36, incl.), and all such relief was denied (Trans 38-9-43), whereupon the said Robinson presented to the court a petition, etc., for an appeal, and the same was allowed (Trs. 121-131, incl.).

It will be noticed that the appeal is not only from the judgment establishing a lien in favor of Hays and Russell, but from all orders thereafter made with reference to the fund, but the appeal proper and the principal question on appeal was and is as to the validity of Hays' and Russell's claim of lien.

All these orders were final orders from which an appeal might be prosecuted.

The court having established a lien on behalf of Russell for \$1,500 and having determined that Hays

was entitled to one-half of the remainder, as shown by the memorandum decision (Trs. 6), which was finally modified (Trs. 16) when the court directed the distribution of the fund by an appealable order in which he directed the clerk to retain the sum total taxed as witness fees, and this was the only order of distribution, the memorandum decision of July 6, 1909, not being an order of distribution and not being a final order was not appealable.

In the memorandum decision of July 6, 1909, the court did not attempt to find the exact amount due Russell, except to say that Russell loaned the total sum of \$1,500, including the loan of \$425 guaranteed by Hays, and in his order of distribution (Trs. 16) he directed the clerk to

“Distribute and pay over to the parties or their attorney the moneys derived under execution for costs herein now in the registry of this court in accordance with the terms and provisions of the decision of this court filed herein on the 6th day of July, 1909.”

But Russell withdrew \$1,790, and how this amount was determined the record fails to disclose, and Hays drew \$496.33, which was the one-half of the judgment collected after deducting the witness fees, which left something like \$500 in the registry of the court to be finally distributed to Robinson as the stakeholder, with reference to which there was no dispute, and the appellant as such stakeholder, having

been authorized by the parties to whom the money belonged to prosecute the appeal and to use the money in the registry of the court for that purpose, applied to the court for an order directing the clerk to pay the court expenses of this appeal out of that portion of the fund (Sup. Trs. 143-5), and because of the application of a portion of the money remaining in the registry of the court appellees claim that the appellant acquiesced in the judgment of distribution. We submit that there is no reasonable ground for such contention. The appellant sought only to realize on the judgment and to have the fund distributed in accordance with the terms and conditions under which the judgment was assigned to him, and that he at no time acquiesced directly or indirectly in the judgment of the court, or in the order of distribution, or in the order fixing the validity of the lien, and every move that he made, as shown by this record, was for the purpose of preserving the rights of all the persons for whom he was acting as stakeholder.

JAMES J. GODFREY,
J. W. ROBINSON,
Solicitors for Appellant.